

An Irish Tale of Judicial Misconduct

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On the evening of Monday, November 9th, Mr. Frank Clarke, Chief Justice of the Irish Supreme Court, published [three letters](#), recounting correspondence between himself and Mr. Seamus Woulfe, another Supreme Court judge – of recent appointment – and former Attorney General of Ireland. That the Chief Justice should have seen fit to publish *any* correspondence between himself and another judge is singular. The content of the letters, however, is altogether peculiar.

The correspondence published by the Chief Justice reflected his perspectives on Mr Justice Woulfe's attendance at a now-infamous dinner in a country hotel on Ireland's West Coast and Mr Justice Woulfe's handling of the controversy that arose as a result of this attendance. The dinner itself – a meeting of the Oireachtas (Parliamentary) Golf Society, organised as a celebration of its 50th anniversary – occurred on August 19th, and was undertaken contrary to [public health advice](#) that had been issued in response to the COVID-19 pandemic. The dinner was held in a single room with a removable dividing partition, splitting the 81 attendees into 45 and 36 people on either side, supposedly to enforce social distancing. However, [subsequent investigation](#) made it clear that attendees had neither observed social distancing rules, nor observed public health advice.

The fallout from the event – inevitably dubbed “Golfgate” – was swift and brutal. The Irish public – many of whom had endured significant hardship as a result of Coronavirus restrictions – were furious that public representatives saw themselves as above the rules to which ordinary people were expected to adhere. The [Minister for Agriculture](#), Dara Calleary, who attended the dinner, resigned within two days. Ireland's EU Commissioner, Phil Hogan, [followed soon after](#), along with the [Deputy Chair of the Senate](#). However, despite the opening of a [police investigation](#) into the event, Mr Justice Woulfe made no indication that he would consider his position.

Judicial accountability à la irlandaise

The situation as it evolved raised significant questions pertaining three inter-related issues, namely judicial independence, judicial accountability, and public confidence in the judiciary. [Ireland's 1937 Constitution](#) makes specific provision – in Article 35.2 – for the first of these categories, providing that “judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law”. However, the second and third are less well defined. This acknowledged lacuna has been the subject of controversy for some time. The legal profession is a deeply conservative institution, so resistant to change that the public was recently treated to the unedifying [18-month-long spectacle](#) of a former Minister for Justice filibustering the upper parliamentary chamber to defeat a bill that would have modernised the judicial appointments process and limited opportunities for cronyism. Similarly, no clear structure for addressing issues concerning judicial conduct has been put in

place since the foundation of the state, despite repeated scandals, including one in which the state was unable to act against a judge who had been charged with having [child pornography](#) on his personal computer. Legislation to address this situation, at least in part, was finally enacted last year. However, the [Judicial Council Act](#) has not yet been [fully commenced](#). Under the Act, the Judicial Conduct Committee, created in July of 2019, has 12 months to draft guidelines for the purposes of addressing complaints concerning judicial conduct. The Council may then take up to a year to consider whether to approve these guidelines. Once these are in place, the Judicial Conduct Committee may address complaints, hold an inquiry, and issue a reprimand or other sanction. This may include making recommendations to government on sanctions up to and including ‘impeachment’ (a subject to which we will have cause to return).

Informal ‘resolution’

Since “Golfgate” occurred prior to any of the above being useful, the Supreme Court implemented an *ad hoc* process, asking former Chief Justice, Susan Denham, to carry out an informal inquiry. [Her report](#), which was forwarded to the fledgling Judicial Council, concluded that Mr Justice Woulfe should not have attended the event, and that he had not considered the propriety of a Supreme Court judge attending a celebratory dinner in a public place during a pandemic. Despite this, Denham concluded that “significant mitigating factors”, including his being newly appointed (and never having sat on the Supreme Court), not having had the benefit of any introductory programme, as well as the absence of a proper set of judicial guidelines or a code of conduct, meant he “did nothing involving impropriety such as would justify calls for his resignation from office”. Such a step would be “unjust and disproportionate”, while Denham suggested that the Chief Justice should deal with the matter via “informal resolution”.

After the report’s publication on October 1st, the Chief Justice arranged to meet with Mr. Justice Woulfe on October 5th, but the planned meeting was postponed and eventually cancelled. Woulfe requested a postponement for “personal reasons” initially, and later on “medical grounds”. [Four separate meetings were scheduled during October](#), but the two judges did not ultimately meet until November 5th. In the meantime, additional information had come to light that had added to the public controversy about the event. While, in August, Woulfe had issued a seemingly contrite, “unreserved” [apology](#) via a statement, transcripts released by the Judicial Council of his interviews with former Chief Justice Denham made it clear that he was unsure what he had to apologise for. He stated that [“it is fair to say that it appears now, objectively, that there was no breach by the organisers, let alone by me”](#), making his previous public apology seem rather disingenuous. Woulfe claimed to have had no knowledge of the guidelines, commissioned an Engineer’s report on the hotel to help him to argue that the dinner was in fact compliant with the rules, and when it was put to him that the dinner had caused a significant public controversy, Woulfe said that the press coverage was “completely fake, [and] overblown”, comparing his treatment by the media to the [Ku Klux Klan](#).

Three letters

And so we return, at last, to the [three letters](#) published by the Chief Justice this Monday. The first letter, by the Chief Justice to Mr. Justice Woulfe, noted that the latter had not broken the criminal law, but that “a judge should not attend any event which is organised in breach of the law or where there may be a reasonable public perception that this is so”. While Woulfe had argued to Denham that technically, the event came within the published guidelines, the Chief Justice noted that his attendance had the potential to add “to a perception that legal technicalities outweigh public health”. Noting that failure by judges “to exercise a reasonable level of vigilance to ensure that they comply with such guidelines unless they have strong justification for doing otherwise” could undermine social solidarity and public trust in the judiciary, the Chief Justice formally reprimanded Woulfe for his actions.

The Chief Justice went on to note that he found it appropriate, in light of his attendance at the dinner alone, that Woulfe waive his pay for three months, and that he had decided he should not sit as a judge until February 2021. Woulfe had instead offered to donate one month’s salary to a chosen charity, and to make a further apology. However, the Chief Justice made it clear that the situation he found himself in, and that which Denham had dealt with were rather different. He noted that it was also “necessary for me to deal with the situation as it now is. The manner in which you have met this problem has, in my view, added very substantially to the damage caused to the Court, the judiciary generally and thus to the administration of justice...”. Noting that the transcripts released by the Judicial Council “appeared to show that [Woulfe] did not appreciate the genuine public concern about the event ... but rather continued to put the controversy down to a media frenzy”, Clarke dismissed the usefulness of a further apology. He noted that Woulfe had “commented adversely on the government’s management of the public health crisis and made remarks critical of the [Prime Minister]”. He stated that it was the “unanimous view of all of the members of the Court ... that the cumulative effect of all of these matters has been to cause a very significant and irreparable damage ... to the Court”. On this basis, the Chief Justice expressed his personal opinion that Woulfe should resign.

In the [second letter](#), Woulfe expended nine pages of text restating his position – ironically leaning heavily upon technical points concerning compliance with guidelines and engineer’s reports, for which the Chief Justice criticised him, while also raising some issues that the Chief Justice had not mentioned (for example, whether a Supreme Court judge socialising with members of Parliament raised issues in relation to the separation of powers) – arriving at the conclusion that he did not feel he should resign. Clarke’s third, brief, letter, acknowledged the points made by Woulfe and stated that he intended to publish all three letters, which he did the same day.

How to impeach a judge

The fallout from “Golfgate” has generated plenty of public controversy in Ireland. However, from a constitutional perspective, it raises a number of questions. The Chief Justice in his letters acknowledged that he was not empowered to force, or even to ask, Woulfe to resign (though Woulfe stated that he was considering the “circumstances under which a Judge should resign under pressure from a fellow Judge”, raising questions of judicial independence). Rather, Article 35.4.1 of the Constitution provides that judges may only be removed from office for “stated misbehaviour or incapacity”, and then only upon resolutions passed by both houses of parliament calling for their removal. This procedure, called impeachment, is complex and time-consuming. Under the relevant [standing orders](#), if a member of the lower house lodges a motion for the removal of a judge, the lower house can either reject the motion, or may establish a special committee for the purpose of reporting on the issue to the House. Committee members, a chairman, and terms of reference are decided upon, and the committee shall hear details of the “stated misbehaviour” of which the judge is accused. The committee proceeds in private, except where the judge requests otherwise and the committee accedes to this. However, the committee may not make any decisions, merely report to the lower house for the purposes of a vote on impeachment.

It is further unclear what “stated misbehaviour” actually entails. To date, no judge has ever been removed on this basis. The term’s origin seems to be the [1701 Act of Settlement](#), considerably pre-dating the foundation of the Irish state, which provided that judges would sit “*Quam diu se bene Gesserint*” (for as long as they behaved well), and that an address of both Houses of Parliament alone could remove them. Subsequent scholarship makes it clear that “stated misbehaviour” entails that judges could not be removed merely for passing judgments that might displease either the legislature or the executive. Rather, it is for the legislature to state, publicly and clearly, what the alleged misbehaviour is. The Supreme Court has previously ruled that the legislature may utilise this power when it deems necessary, and that it is [“included in the Constitution for the purpose of ensuring the fitness and integrity of the judiciary”](#).

To catch a Woulfe? Setting the standard

The inevitable question is: what next? There is no doubt that this affair has caused damage to the Supreme Court in the eyes of the public. This opinion is universally shared by Woulfe’s fellow Justices. However, if Woulfe is impeached, he could conceivably seek a judicial review against the decision. This could lead to the farcical situation where he, a Supreme Court judge – would find himself an applicant before that same court – seeking a declaration that the threshold of “stated misbehaviour” had not, in fact, been met, and that he should remain a member of the Court. The Chief Justice and his colleagues would have to pass judgment in the case. This would hardly enhance the already rather battered reputation of the Court, or indeed the cause of judicial independence.

However, there is a still more concerning issue to be addressed, namely that of precedent. Suppose that impeachment proceeds, and that Justice Woulfe is removed from his post. “Stated misbehaviour” will at last have been defined, and the bar will be so low that no criminal conduct is required. Rather, a combination of misjudgment, arrogance, entitlement and a lack of self-awareness seem to suffice. The Chief Justice makes it explicit in his letter that breaching the spirit – if not the letter – of the relevant health regulations would not, alone, have brought him to the conclusion that Woulfe’s resignation was necessary. Rather, Woulfe’s insincere apology, his ill-judged comparisons with the Ku Klux Klan, and his generally tone-deaf attitude tipped the balance, as on this basis, public trust in the judiciary was severely damaged. However, whether Ireland wishes to make this the standard for removing judges is questionable. The continuing controversy in Poland with regard to the replacement of judges should at least give us pause for thought. It may not be today or tomorrow that the consequences of the Woulfe case become apparent. However, it is not inconceivable that a government with a large parliamentary majority might seek to remove judges that issue judgments of which it disapproves, ostensibly on the basis that they are unpopular with the public. In instituting such a low bar, the temptation for those with authoritarian tendencies is clear, and the threat to the separation of powers, readily apparent. We may not like Justice Woulfe very much after all this. He probably should resign. But perhaps we should think twice before forcing him to.

